
(2009) 01 AP CK 0011
In the Andhra Pradesh High Court
Case No : C.R.P. No. 3472 of 2008

E.N. Satyanarayana

APPELLANT

Vs

Smt. Chowdamma

RESPONDENT

Date of Decision : 21-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 38

Citation : (2009) 4 ALD 666 : (2009) 5 ALT 251 : (2009) 1 APLJ 110

Hon'ble Judges : G. Rohini, J

Bench : Single Bench

Advocate : M.R. Mohammed Irfan, for the Appellant; E.V. Bhagiratha Rao, for the Respondent

Final Decision : Allowed

Judgement

G. Rohini, J.—This Civil Revision Petition is directed against the order dated 23-07-2008 made in E.P. No. 129 of 2006 in O.S. No. 9 of 2004 on the file of the Court of Junior Civil Judge, Hindupur directing arrest of the revision petitioner in execution of the decree dated: 02-03-2006 in O.S. No. 9 of 2004.

2. The facts, in brief, are as under:

The respondent herein filed O.S. No. 9 of 2004 on the file of the Court of Junior Civil Judge, Hindupur for recovery of Rs. 45,000/-allegedly due from the defendant/revision petitioner. The said suit was decreed by judgment dated: 02-03-2006 as prayed for. Pursuant to the said decree, the respondent/Decree Holder filed E.P. No. 129 of 2006 under Order XXI, Rule 38 of the Code of Civil Procedure, 1908 for arrest of the revision petitioner/Judgment Debtor, alleging that he was evading the payment of the decretal amount. In support of the said allegations she got herself examined as P.W.1 and two more witnesses were examined as P.Ws. 2 and 3. The extract of the Certificate of Registration of a Car was also marked as Ex.P-1 to substantiate the plea that the Judgment Debtor owned a Maruti Car and that he had sufficient means to pay the decretal amount.

The Judgment Debtor/revision petitioner got himself examined as R.W. 1.

3. On appreciation of the said evidence, the Court below allowed the Execution Petition and ordered arrest of the Judgment Debtor. The said order dated 23-07-2008 is under challenge in this Civil Revision Petition contending inter alia that Decree Holder ought to have sought for recovery of the decretal amount by proceeding against the landed property in respect of which an order of attachment before Judgment was in operation during the pendency of the suit.

4. On the other hand the learned Counsel for the respondent contended that it is for the Decree Holder to choose any one of the modes of execution and the order under revision directing arrest of the Judgment Debtor cannot be held to be erroneous merely on the ground that other immovable properties are available. In support of his submission the learned Counsel for the respondent relied upon a decision of this Court in Gudiwada Munemma Vs. Jawardhal, .

5. It is true that in the said decision it was held that once the Court is satisfied that the Judgment Debtor has neglected to pay the decretal amount in spite of possessing sufficient means, refusal to order his arrest and detention in civil prison on the ground of availability of alternative remedy of attachment of his properties is not legal.

6. However, as held by the Supreme Court in Jolly George Varghese and Another Vs. The Bank of Cochin, simple default to discharge the decree is not enough to order arrest but there must be some element of bad faith beyond mere indifference to pay. It was also held by the Supreme Court that even where it is pleaded that the Judgment Debtor is possessed of some immovable property, the burden lies on the Decree Holder to show that the Judgment Debtor has the capacity to pay the decretal amount.

7. Following the principles laid down in Jolly George Varghese (supra) case this Court disposed of Civil Revision Petition No. 491 of 2008 holding that it is also necessary for the Courts to enquire whether the property possessed by the Judgment Debtor is income yielding so as to hold that he has sufficient means to pay the decretal amount at the relevant point of time. It was also observed in the said decision that if the immovable property possessed by the Judgment Debtor is not yielding income to enable the Judgment Debtor to pay the decretal amount, probably it is for the Decree Holder to take recourse to other modes of recovery in execution of the decree instead of insisting on arrest of the Judgment Debtor.

8. It is also relevant to note that the Apex Court in a catena of decisions expressed that the Courts are expected to be cautious while making order of arrest in execution of the decree since it involves personal liberty and it is necessary for the Courts to examine whether other modes of recovery are available to the Decree Holder and whether it is absolutely necessary to order arrest for recovery of the decretal amount.

9. In the case on hand pending the suit admittedly there was an order of attachment before the judgment in respect of Ac. 10.00 of land belonging to the judgment debtor. However, instead of proceeding against the said property, the Decree Holder has chosen to seek execution of the decree by arrest of the Judgment Debtor.

10. No reason is forthcoming as to why the Decree Holder has not chosen to proceed against the said property and the court below failed to make any enquiry in that regard.

11. Without recording any finding that the said property which was attached pending the suit is not available for sale so as to recover the decretal amount, the impugned order directing arrest of the Judgment Debtor/revision petitioner is unwarranted and unjustified.

12. Accordingly the order under revision is hereby set aside and the Civil Revision Petition is allowed with a direction to the Court below to reconsider E.P. No. 129 of 2006 in O.S. No. 9 of 2004 on the file of the Court of Junior Civil Judge, Hindupur after making an enquiry in the light of the observations made above and pass appropriate orders afresh in accordance with law. No costs.